

The Senate

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Standing  
Committee for the Scrutiny of  
Delegated Legislation

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Guidelines

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# Introduction

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) was originally established in 1932 (previously known as the Senate Standing Committee on Regulations and Ordinances) and is one of the oldest standing committees in the Australian Parliament.

The committee examines the technical qualities of all legislative instruments to assess whether they comply with the committee's scrutiny principles, which are set out in Senate standing order 23(3).

In addition, the Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the Senate's attention should be drawn to it on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.

This is the third edition of the committee's guidelines which provides updated guidance on the committee's scrutiny work.

These guidelines are intended as a guide only and are not meant to be definitive. If you have any feedback or questions relating to the committee's role, expectations or functions please contact the committee secretariat on (02) 6277 3066 or by email at [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

## Working with the Committee

### *Ministerial engagement*

Where the instrument raises significant scrutiny concerns, the committee will detail its concerns to the responsible minister in its regular report to the Senate, known as the Delegated Legislation Monitor. The committee's concerns and any ministerial response received will be published on the committee's website.

### *Agency correspondence*

The committee secretariat, acting on the committee's behalf, will often seek additional information or clarification from agencies before the committee escalates a matter to the relevant minister. In contrast to the committee's ministerial engagement, the committee will not publish the content of any correspondence received from an agency. However, the committee will publish a record of the instruments in relation to which it is engaging in its Delegated Legislation Monitor.

### *Timeframes for responses*

Generally, a one-week timeframe is provided for agencies to respond and a two week timeframe for ministers to respond. The committee's timeframes for responses are designed to enable it to conclude its consideration of an instrument before the instrument's disallowance period expires or, in the case of instruments exempt from disallowance, to allow the committee to report to the Senate in a timely manner. Extensions of time can be requested by contacting the committee's secretariat.

If the committee is unable to conclude its consideration of a disallowable instrument before the original disallowance period expires, it will give a 'protective' notice of motion to disallow the instrument. This extends the disallowance period by another 15 sitting days from the sitting day after the notice is given. Further information about the disallowance process is included below.

### *Private briefings*

Where appropriate, the committee may invite a minister or officials to attend a private briefing to enable the committee to further explore its scrutiny concerns. The committee has found this to be a useful process to assist it in resolving its scrutiny concerns.

### *Referring matters of interest to the Senate*

Where appropriate, the committee may determine that an instrument should be drawn to the attention of the Senate on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate. The committee may do this in a number of ways, including reporting on the instrument in its Delegated Legislation Monitor or writing to the relevant Senate committee.

### *Disallowance*

Disallowance is the primary mechanism by which the Parliament exercises control over delegated legislation. The disallowance process allows either House of the Parliament to veto a legislative instrument. All legislative instruments are subject to disallowance unless exempted by law.

Once a legislative instrument has been tabled in the Senate or the House of Representatives, any member of the relevant House may give a notice of motion to disallow a legislative instrument within 15 sitting days. Disallowance has the effect of repealing the legislative instrument.

As noted above, the committee will give a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original disallowance period expires.

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant, unresolved scrutiny concerns and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will advise the relevant minister in writing of its recommendation and will publish a summary of its scrutiny concerns in the Delegated Legislation Monitor.

All notices of motion to disallow are recorded on the [Disallowance Alert](#).

For more information on the disallowance process see [Odgers' Australian Senate Practice](#) and [Guide to Senate Procedure No. 19 - Disallowance](#).

### *Undertakings*

The committee may ask the responsible minister or agency to make an undertaking to address the committee's scrutiny concerns. For example, the committee may ask the minister or agency to amend an instrument or an explanatory statement.

The [Index of Undertakings](#), published on the committee's website, lists all outstanding undertakings and undertakings that the committee is aware have been implemented since the tabling of the previous Monitor. To ensure that the index is accurate, please notify the committee secretariat when an undertaking has been implemented (for example, when an amending instrument or replacement explanatory statement has been registered).

The committee expects that undertakings will be implemented in a timely manner.

## **Contact details**

If you have any questions, please do not hesitate to contact the committee secretariat by phone on (02) 6277 3066 or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au). Further information is available on the committee's website.

Agency and ministerial responses should also be sent by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Ministerial responses should be signed by the relevant minister and addressed to:

Chair

Senate Scrutiny of Delegated Legislation Committee

Suite S1.110

Parliament House

CANBERRA ACT 2600





# Principle (a): Compliance with legislative requirements

## Overview

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. Under this principle, the committee is typically concerned with:

- whether the instrument is within the powers conferred by its enabling Act so that it is legally authorised;
- whether any statutory preconditions to the making of the instrument have been satisfied; and
- whether the instrument complies with all other relevant legislative requirements.

## Requirements of the enabling Act and statutory preconditions

A legislative instrument must be made in accordance with the powers conferred by its enabling legislation, including any relevant statutory limitations or preconditions. This includes those in the *Acts Interpretation Act 1901* (Interpretation Act).

The explanatory statement to the instrument should therefore indicate:

- the source of legislative authority for the instrument, including its enabling provision(s);
- whether any statutory preconditions for the instrument to be lawfully made were satisfied and the factual basis for satisfying those preconditions;
- if the instrument was made in anticipation of the commencement of its enabling provision(s), that the instrument relies on section 4 of the Interpretation Act; and
- if the instrument repeals or amends another instrument, and there is no express power in its enabling legislation to do so, that the instrument relies on subsection 33(3) of the Interpretation Act.

## Requirements of the Legislation Act

An instrument and its accompanying explanatory statement must also comply with the requirements of the *Legislation Act 2003* (Legislation Act).

The explanatory statement should therefore address the following requirements of that Act:

- **purpose and operation of the instrument** – the instrument's explanatory statement must explain the purpose and operation of the instrument (paragraph 15J(2)(b));
- **retrospective commencement** – if the instrument, or part of the instrument, applies retrospectively, the committee expects the explanatory statement to address whether this would disadvantage rights or impose liabilities on a person other than the Commonwealth. That is because retrospective commencement does not apply to the extent it disadvantages a person's rights or imposes liabilities on a person other than the Commonwealth (subsection 12(2)). Further information can be found in the committee's guideline on principle (h);
- **incorporation** – if the instrument incorporates a document, its explanatory statement must describe the document and indicate how it may be obtained (paragraph 15J(2)(c)). The committee expects the explanatory statement to indicate whether the document can be freely accessed and used. It also expects the explanatory statement to indicate the manner of incorporation, such as incorporating the document at a certain date or as it exists from time-to-time, and the legislative authority relied upon to incorporate the document from time-to-time (if applicable). Further information can be found in the committee's guideline on principle (f);

- **consultation** – any consultation that the rule-maker considers to be appropriate and that is reasonably practicable must be undertaken (subsection 17(1)). In determining whether consultation was appropriate, the rule-maker may have regard to relevant matters, including consultation with experts and persons likely to be affected (subsection 17(2)). The committee expects the explanatory statement to describe the nature of any consultation undertaken in relation to the specific instrument (and not only to a broader issue or a series of legislative reforms or instruments). If no consultation was undertaken, the explanatory statement must explain why no consultation was undertaken (paragraph 15J(2)(e)). Further information can be found in the committee’s guideline on principle (d); and
- **statement of compatibility with human rights** – the explanatory statement to a disallowable instrument must include a statement of compatibility with human rights (paragraph 15J(2)(f)), which the committee expects to be in the form of a ‘standalone’ statement. That is, the reader should be able to understand the overall measures in the instrument without needing to refer to other parts of the explanatory statement. Additional information in relation to human rights is available on the Parliamentary Joint Committee on Human Rights [website](#), including a [guidance note on drafting statements of compatibility with human rights](#). Further information about statements of compatibility is also available on the Attorney-General's Department’s [website](#).

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (a):

- Legislative authority**

The explanatory statement should:

  - identify specific provision(s) of its enabling Act that provide the legal authority for the instrument to be made;
  - note that the instrument relies on section 4 of the Interpretation Act if it is made in anticipation of the commencement of its enabling provisions; and
  - note that the instrument relies on subsection 33(3) of the Interpretation Act if the instrument repeals or amends another instrument and there is no express power in its enabling legislation to do so.
  
- Compliance with legislative preconditions**

If the instrument's enabling legislation establishes any preconditions for making the instrument, the explanatory statement should explain how they have been satisfied.
  
- Incorporation of documents**

If the instrument incorporates a document, the explanatory statement should:

  - identify the document with sufficient specificity (e.g., name and edition, if applicable);
  - indicate how the document may be obtained, including whether it can be freely accessed and used;
  - provide the manner of incorporation (e.g., incorporated as of a certain date or as it exists from time-to-time); and
  - indicate the legislative authority relied upon to incorporate the document from time-to-time (if applicable).
  
- Consultation**

The explanatory statement should address:

  - whether consultation occurred in relation to the specific instrument, and if not, why no consultation occurred; and
  - the nature of any consultation that occurred and whether experts and persons likely to be affected by the instrument were consulted.
  
- Explanation of purpose**

The explanatory statement must explain the purpose and operation of the instrument.
  
- Statement of compatibility with human rights**

The explanatory statement of a disallowable instrument must contain a 'standalone' statement of compatibility with human rights.
  
- Explanation of retrospective commencement**

If the instrument, or part of the instrument, applies retrospectively, the explanatory statement should address whether this would disadvantage rights or impose liabilities on a person other than the Commonwealth.



## Principle (b): Constitutional validity

### Overview

Senate standing order 23(3)(b) requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid.

The committee's consistent view is that questions of legal validity, including constitutional validity, are ultimately for the courts to determine, and that it is therefore not the committee's role to make determinative statements about such matters. Nevertheless, there may be certain circumstances where it is appropriate to raise constitutional concerns or draw constitutional questions to the attention of the Senate.

Under this principle, the committee will typically be concerned with:

- whether grants and programs specified in instruments made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* appear to be supported by a constitutional head of legislative power; and
- instruments which raise questions as to whether they:
  - may breach the separation of powers doctrine embodied in the Constitution; or
  - may restrict the constitutionally protected freedom of political communication.

### Constitutional heads of legislative power

#### *Instruments specifying expenditure*

Explanatory statements to instruments that authorise expenditure on specified grants and programs (usually made under the *Financial Framework (Supplementary Powers) Act 1997* or the *Industry Research and Development Act 1986*) should:

- clearly identify each constitutional head of legislative power that is relied on to support expenditure on the relevant grant or program; and
- explain how each identified constitutional head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate.

Where numerous constitutional heads of legislative power are relied upon, the explanatory statement should include sufficient information to establish how the identified heads of power provide authority for the entirety of the relevant grant or program.

### Other constitutional matters

Examples of other constitutional matters that the committee may raise under scrutiny principle (b) are outlined below.

#### *Separation of powers*

Where it appears that an instrument may infringe the separation of powers doctrine embodied in Chapter III of the Constitution, the committee will look to the explanatory statement for an explanation of how the instrument complies with the requirements of the doctrine. For example, where an instrument confers non-judicial functions or powers on a Commonwealth court or federal judicial officer, the explanatory statement should set out whether the functions or powers are to be exercised by the court or judicial officer acting in a non-judicial (e.g. personal) capacity.

## ***Implied freedom of political communication***

Where an instrument raises a question as to whether it may restrict the constitutionally protected implied freedom of political communication, the committee expects the instrument's explanatory statement to address how the instrument does not impermissibly restrict this freedom with reference to relevant jurisprudence. For example, where an instrument limits political discourse, the explanatory statement should provide an explanation on how the freedom of political communication, which extends to communication necessary for the effective operation of representative and responsible government, is not fettered.

## **Explanatory statement checklist**

The following checklist summarises the types of information which should be included in the instrument's explanatory statement under scrutiny principle (b).

- |  |  |
|--|--|
| <input type="checkbox"/> <b>Instruments specifying expenditure</b>         | Where an instrument specifies expenditure, the explanatory statement should: <ul style="list-style-type: none"><li>• clearly identify each constitutional head of legislative power that is relied on to support expenditure on the relevant grant or program;</li><li>• explain how each identified constitutional head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate; and</li><li>• where numerous constitutional heads of legislative power are relied on, explain how the identified heads of power provide authority for the whole of the grant or program.</li></ul> |
| <input type="checkbox"/> <b>Separation of powers</b>                       | Where an instrument confers non-judicial functions or powers on a federal court or judicial officer, the explanatory statement should include an explanation of how the instrument complies with the separation of powers doctrine embodied in the Constitution.   |
| <input type="checkbox"/> <b>Implied freedom of political communication</b> | Where an instrument raises a question as to whether it may restrict the constitutionally protected implied freedom of political communication, the explanatory statement should address how the instrument does not impermissibly restrict the freedom, drawing on relevant jurisprudence where appropriate.   |

## **Principle (c): Administrative powers and functions**

### **Overview**

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. Under this principle, the committee will typically be concerned with provisions in instruments which:

- broadly delegate administrative powers and functions;
- confer broad discretionary powers; or
- facilitate automated administrative decision-making.

### **Conferral of broad discretionary powers**

Instruments frequently confer discretionary powers on a person, for example, on the minister to make a decision. Where an instrument confers broad discretionary powers on a person, the instrument should set out the factors which the person must consider in exercising those powers. The explanatory statement should also address the following matters:

- the purpose and scope of the discretionary powers, including why they are considered necessary;
- an explanation of who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills;
- the nature and source of any limitations and safeguards relevant to the exercise of the powers, including whether they are contained in law or policy; and
- the availability of independent merits review at the Administrative Appeals Tribunal or any other body, noting this issue is considered in more detail under principle (i).

### **Delegation of administrative powers and functions**

Instruments may authorise a person to delegate their powers or functions to another person. Where an instrument confers the power to delegate administrative powers or functions on another person, the explanatory statement should address the following matters:

- the purpose and scope of the delegation, including why it is considered necessary; and
- an explanation of who will be exercising the delegated powers and functions, including whether they possess the appropriate qualifications and necessary skills; and
- the nature and source of any limitations and safeguards relevant to the delegation, including whether they are contained in law or policy.

In addition, where the instrument authorises a person to delegate administrative powers or functions to a member of the Australian Public Service, the committee expects that the delegation will be limited to members of the Senior Executive Service (SES) or equivalent. Consequently, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.

### **Automated decision-making**

Provisions which facilitate automated administrative decision-making may also raise concerns under this principle, as they may fetter the exercise of discretionary power. Accordingly, the committee

considers that, whilst technology may be used to *assist* in the decision-making process, instruments should not provide for the automation of discretionary decisions, themselves.

For this reason, the committee generally considers the use of automated systems to make decisions is only suitable in relation to non-discretionary decisions, except where the scope of discretion is very narrow with objective criteria. The committee's concerns regarding automated assistance in decision making will be heightened where independent merits review is not available (see principle (i) for further detail).

Where an instrument provides for automated assistance in a decision-making process, the explanatory statement should:

- clearly explain that automated assistance/decision making is involved as well as the nature and extent of the automated element;
- explain why it is considered necessary and appropriate to provide for automated assistance in the decision-making process;
- explain what safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter; and
- explain whether rights are available for review of automated decisions by a human decision-maker, clear pathways to seek such review, and whether there are mechanisms in place to enable errors to be corrected.



## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (c).

- Purpose, scope and necessity of the provisions** The instrument's explanatory statement should explain the purpose, scope and necessity of including provisions which confer broad discretionary powers on a person or authorise a person to delegate administrative powers or functions to others.
- Qualifications and skills of the persons exercising the power** The instrument's explanatory statement should explain why it is appropriate for the person or delegate to exercise administrative powers or functions, including whether they would possess the appropriate qualifications and necessary skills.
- Limitations and safeguards** The instrument's explanatory statement should explain the nature and source of any limitations or safeguards relevant to the exercise of the administrative powers or functions, including whether those safeguards or limitations are contained in law or policy. Where the instrument authorises the delegation of administrative powers or functions to a member of the Australian Public Service, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.
- Automated decision-making** Specifically, where an instrument facilitates automated decision making, the explanatory statement should explain:
  - the nature and extent of the automated decision-making;
  - why it is considered necessary and appropriate to provide for automated assistance in the decision-making process;
  - explain what safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter, as well as in relation to review rights and correction of errors.



## Principle (d): Adequacy of consultation

### Overview

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether those likely to be affected by the instrument were adequately consulted in relation to it. This is in addition to standing order 23(3)(a).<sup>1</sup> Under principle (d), the committee will typically be concerned with:

- whether consultation occurred in relation to the specific instrument; and
- whether experts or persons likely to be affected by the instrument were consulted.

The committee's expectations under this principle are further supported by the requirement in the *Legislation Act 2003* (Legislation Act) that, before making an instrument, a rule-maker must be satisfied that any consultation that was appropriate and reasonably practicable was undertaken. This includes considering the extent to which experts and persons likely to be affected were consulted.

### Consultation on the specific instrument

The committee expects the explanatory statement to an instrument to address consultation that was undertaken *in relation to the specific instrument*. This includes a detailed explanation of who was consulted, the issues raised during consultation and a summary of the outcomes of the consultation process (for example, any action that has been taken based on comments or submissions received).

Where, however, consultation was previously undertaken in relation to a broader issue, a series of legislative reforms or instruments, but no further consultation was undertaken in relation to the specific instrument, the explanatory statement should address:

- what consultation was previously undertaken; and
- why it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

### Consultation with experts and persons likely to be affected by the instrument

Senate Standing Order 23(3)(d) specifically requires the committee to consider whether those likely to be affected by the instrument were adequately consulted. In addition, under the Legislation Act, in determining whether consultation was appropriate, a rule-maker may have regard to any relevant matter, which includes whether persons affected by the instrument were consulted.<sup>2</sup> Under this principle, the committee will consider the extent to which relevant experts and persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.<sup>3</sup> The committee expects the explanatory statement to include:

- a detailed explanation of any consultation undertaken with experts and persons likely to be affected by the instrument; or

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<sup>1</sup> Senate Standing Order 23(3)(a) requires the committee to scrutinise instruments as to whether they are in accordance with their enabling Act and otherwise comply with all legislative requirements. That includes consultation requirements set out in the Legislation Act.

<sup>2</sup> *Legislation Act 2003*, subsections 17(1) and 17(2).

<sup>3</sup> *Legislation Act 2003*, paragraph 17(2)(b).

- if no consultation was undertaken with such persons, the reason for not undertaking consultation with experts and persons likely to be affected by the instrument; and
- a summary of the outcomes of the consultation process (for example, any action that has been taken based on comments or submissions received).

### **Consultation with the Office of Impact Analysis**

The committee does not consider consultation with the Office of Impact Analysis (formerly the Office of Best Practice Regulation) to be an adequate substitute for consulting with experts and persons likely to be affected by the instrument.

### **Explanatory statement checklist**

The following checklist summarises what should be included in an instrument’s explanatory statement under scrutiny principle (d).

**Consultation**

The explanatory statement should include:

- a detailed explanation of what consultation was undertaken, including:
  - whether consultation was undertaken in relation to the specific instrument; and
  - whether experts and persons likely to be affected by the instrument were consulted; or
 if not, why no such consultation occurred;
- if the rule-maker is relying on previous broader consultation, an explanation of why it was considered unnecessary to undertake additional consultation in relation to the specific instrument; and
- a detailed description of the outcomes of the consultation (for example, any action that has been taken based on comments or submissions received).

# Principle (e): Drafting

## Overview

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. Under this principle, the committee will typically be concerned with instruments which:

- contain errors or unclear drafting which are likely to affect the meaning or interpretation of the instrument; or
- do not clearly define key terms.

## Drafting errors

Where an instrument contains a drafting error which may affect the meaning or interpretation of the instrument, the committee will raise the matter with the relevant agency and would generally expect such errors to be corrected as soon as practicable.

## Clarity of drafting and legal certainty

Under this principle, the committee also considers the clarity and certainty of rights and obligations in legislative instruments. Unclear drafting may affect the meaning or interpretation of an instrument and may prevent persons, including those directly affected by the law, from understanding their rights and obligations. Instruments and their explanatory statements should therefore be clear and intelligible to all persons, not only those with particular knowledge or expertise.

In addition, key terms (this includes specialist terms or 'terms of art' specific to a particular industry as well as legal terms) should be clearly defined to remove any potential confusion or misunderstanding. Where the definition of a key term is sourced from the instrument's enabling legislation or another source of legislation, the relevant source provision should be cited in the instrument and/or its explanatory statement. This is particularly important where a term has a specific meaning within the context of a statutory scheme.

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (e).

- |                          |                         |   |
|--------------------------|-------------------------|---|
| <input type="checkbox"/> | <b>Clear drafting</b>   | Instruments and explanatory statements should be drafted in such a way that they are clear and intelligible to all persons, including that individuals' rights and obligations are clear.   |
| <input type="checkbox"/> | <b>Define key terms</b> | Key terms – including specialist terms or 'terms of art' used in a specific industry and legal terms – should be clearly defined in the instrument and its explanatory statement. Where the definition of a key term is sourced from other legislation, the relevant source provision should be cited in the explanatory statement. |



# Principle (f): Access and use

## Overview

Senate standing order 23(3)(f) requires the committee to scrutinise each instrument as to whether it, and any document it incorporates, may be freely accessed and used. Under this principle, the committee will typically be concerned with instruments which incorporate documents that:

- are not freely accessible; or
- are subject to copyright.

## Incorporation by reference

In some cases, legislative instruments may incorporate other documents by reference. A document is likely to be incorporated by a legislative instrument where that document is necessary to interpret, apply or otherwise use that instrument. Examples of documents which are frequently incorporated include guidelines, standards and codes of practice.

Documents can be incorporated by reference in the following ways:

- as they exist at a fixed point in time (for example, at the commencement of the instrument, or another specified date); or
- as in force from time-to-time, which allows any future version of the document to be automatically incorporated (noting this manner of incorporation must be authorised by the enabling legislation).

Where an instrument incorporates a document by reference, the explanatory statement should:

- clearly state that the document is incorporated and identify that document with sufficient specificity to make it clear which document is incorporated (e.g., name and edition, if applicable);
- indicate how the document may be obtained, including whether it can be freely accessed and used;
- address the manner of incorporation (e.g., incorporated as at a certain date or as it exists from time-to-time); and
- indicate the legislative authority relied upon to incorporate the document from time-to-time (if applicable).

## Free access and use

All documents incorporated by reference should be available to the public free of charge. Where an instrument incorporates a document, the explanatory statement should identify where the document can be freely accessed. This may be by:

- identifying a website where the document may be viewed or downloaded free of charge;
- noting that the document may be accessed free of charge at specified public libraries; or
- noting that the instrument may be available for viewing at specified offices (e.g. departmental or agency offices).

## Documents subject to copyright

Legislative instruments or any incorporated documents should not be subject to copyright as this may inhibit the capacity of people to access and use the law. However, if it is necessary for copyright to

apply, the committee expects the material to be available to the public free of charge, without the risk of breaching copyright. Accordingly, the explanatory statement to the instrument should address the following matters:

- why it is considered necessary to use copyrighted material in a legislative instrument or incorporated document;
- how the use of copyrighted material may impact the ability of members of the public to access and understand the law; and
- whether individuals can access the material in other ways, such as by viewing the instrument or document at a specified location or by appointment.

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument’s explanatory statement under scrutiny principle (f).

- |  |   |
|--|---|
| <input type="checkbox"/> <b>Incorporation of documents and free access and use</b> | If the instrument incorporates a document, the explanatory statement should: <ul style="list-style-type: none"><li>• clearly state that a document is incorporated and identify it with sufficient specificity (e.g., name and edition, if applicable);</li><li>• indicate how the document may be obtained, including whether it can be freely accessed, for example, online, at specified public libraries or made available for viewing at specified offices;</li><li>• address the manner of incorporation (e.g., incorporated as at a certain date or as it exists from time-to-time); and</li><li>• indicate the legislative authority relied upon to incorporate the document from time-to-time (if applicable).</li></ul> |
| <input type="checkbox"/> <b>Documents subject to copyright</b>                     | If the instrument or any incorporated document is subject to copyright, the explanatory statement should explain: <ul style="list-style-type: none"><li>• the necessity of using copyrighted material in the instrument;</li><li>• how the use of copyrighted material may impact the ability of members of the public to access and understand the law;</li><li>• and how individuals can access the document in other ways (e.g., viewing the instrument or document at a specified location or by appointment).</li></ul>  |



## Principle (g): Adequacy of explanatory materials

### Overview

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The committee has long emphasised the importance of explanatory statements as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. The checklists below identify the types of information which the committee typically considers should be included in explanatory statements. They are indicative, rather than exhaustive, and the committee's expectations may differ depending on the purpose and scope of the instrument.

□	<b>Legislative authority</b>	<p>The instrument's explanatory statement should:</p> <ul style="list-style-type: none"> <li>• identify specific provision(s) of its enabling Act that provide the legal authority for the instrument to be made;</li> <li>• note that the instrument relies on section 4 of the Interpretation Act if it is made in anticipation of the commencement of its enabling provisions; and</li> <li>• note that the instrument relies on subsection 33(3) of the Interpretation Act if the instrument repeals or amends another instrument and there is no express power in its enabling legislation to do so.</li> </ul>
□	<b>Compliance with legislative preconditions</b>	<p>If the instrument's enabling legislation establishes any preconditions for making the instrument, the explanatory statement should explain how they have been satisfied.</p>
□	<b>Explanation of purpose</b>	<p>The explanatory statement must explain the purpose and operation of the instrument, with sufficient detail for a reader to understand how each clause will function.</p>
□	<b>Statement of compatibility with human rights</b>	<p>The explanatory statement of a disallowable instrument must contain a 'standalone' statement of compatibility with human rights.</p>
□	<b>Constitutional validity</b>	<p><i>Instruments specifying expenditure</i></p> <p>Where an instrument specifies expenditure, the explanatory statement should identify how the constitutional head/s of legislative power relied on support the grant or program.</p> <p><i>Separation of powers</i></p> <p>Where an instrument confers non-judicial functions or powers on a federal court or judicial officer, the explanatory statement should include an explanation of how the instrument complies with the separation of powers doctrine embodied in the Constitution.</p> <p><i>Implied freedom of political communication</i></p> <p>Where an instrument raises a question as to whether it may restrict the constitutionally protected freedom of political communication, the explanatory statement should address how the instrument does not impermissibly restrict the freedom, drawing on relevant jurisprudence where appropriate.</p>

□	<b>Delegated and discretionary powers</b>	<p>Where an instrument delegates administrative powers or functions, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the purpose, scope and necessity of including provisions which confer broad discretionary powers on a person or authorise a person to delegate administrative powers or functions to others;</li> <li>• why it is appropriate for the relevant person or delegate to exercise administrative powers or functions, including whether they would possess the appropriate qualifications and necessary skills;</li> <li>• the nature and source of any limitations or safeguards relevant to the exercise of the administrative powers or functions, including whether those safeguards or limitations are contained in law or policy. Where the instrument authorises the delegation of administrative powers or functions to a member of the Australian Public Service, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.</li> </ul>
□	<b>Automated decision-making</b>	<p>Where an instrument facilitates automated decision making, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and extent of the automated decision-making;</li> <li>• why it is considered necessary and appropriate to provide for automated assistance in the decision-making process;</li> <li>• safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter, as well as in relation to review rights and correction of errors.</li> </ul>
□	<b>Consultation</b>	<p>The instrument's explanatory statement should include:</p> <ul style="list-style-type: none"> <li>• a detailed explanation of what consultation was undertaken in relation to the specific instrument, including consultation in relation to the specific instrument and with experts and persons likely to be affected;</li> <li>• if not, why no such consultation occurred;</li> <li>• if the rule-maker is relying on previous broader consultation, why it was considered unnecessary to undertake additional consultation in relation to the specific instrument; and</li> <li>• a description of the outcomes of the consultation (for example, any action that has been taken based on comments or submissions received).</li> </ul>
□	<b>Clear drafting</b>	<p>Instruments and explanatory statements should be drafted in such a way that individuals' rights and obligations are clear.</p>
□	<b>Clearly define key terms</b>	<p>Key terms should be clearly defined in the instrument and its explanatory statement. Where the definition of a key term is sourced from other legislation, the relevant source provision should be cited in the explanatory statement.</p>
□	<b>Incorporation of documents and free access and use</b>	<p>If the instrument incorporates a document, the explanatory statement should:</p> <ul style="list-style-type: none"> <li>• identify the document with sufficient specificity (e.g; name and edition, if applicable);</li> <li>• indicate how the document may be obtained, including whether it can be freely accessed, for example, online, at specified public libraries or made available for viewing at specified offices;</li> <li>• address the manner of incorporation (e.g., incorporated as of a certain date or as it exists from time-to-time); and</li> </ul>

	<ul style="list-style-type: none"> <li>• indicate the legislative authority relied upon to incorporate the document from time-to-time (if applicable).</li> </ul> <p>If the instrument or incorporated document/s are subject to copyright, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• why it is necessary to use the copyrighted material;</li> <li>• how the use of the copyrighted material may impact the ability of the public to access and understand the law; and</li> <li>• how individuals can access the document in other ways.</li> </ul>
<input type="checkbox"/>	<p><b>Collection, use and disclosure of personal information (privacy)</b></p> <p>Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the provisions, including the extent of the personal information that may be disclosed and the persons or entities to whom disclosure is permitted;</li> <li>• why the provisions are considered necessary and appropriate;</li> <li>• whether a privacy impact statement was prepared; and</li> <li>• what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the <i>Privacy Act 1988</i> applies).</li> </ul>
<input type="checkbox"/>	<p><b>Coercive powers</b></p> <p>Where an instrument includes entry, search and seizure powers, provides for the confiscation or destruction of personal property, or authorises the use of force, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the powers, and the circumstances in which the powers will be exercised;</li> <li>• why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;</li> <li>• who may exercise the powers, and whether they are required to possess specific skills or qualifications;</li> <li>• whether compensation is available for any property seized or destroyed in the exercise of the powers;</li> <li>• whether independent review is available of decisions made, and actions taken, in connection with the exercise of the powers; and</li> <li>• whether the provisions comply with Chapters 7 and 8 of the Attorney General's Department's <a href="#"><i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i></a>.</li> </ul>
<input type="checkbox"/>	<p><b>Retrospective commencement or effect</b></p> <p>Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the provisions;</li> <li>• why the retrospectivity is considered necessary and appropriate; and</li> <li>• whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.</li> </ul>
<input type="checkbox"/>	<p><b>Abrogation of the privilege against self-incrimination</b></p> <p>Where an instrument abrogates this privilege, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the abrogation of the privilege against self-incrimination, including any limitations on the abrogation;</li> <li>• why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;</li> </ul>

	<ul style="list-style-type: none"> <li>• the provision of use or derivative use immunity; and</li> <li>• any restrictions on the sharing of information obtained with law enforcement agencies.</li> </ul>
<input type="checkbox"/>	<p><b>Immunity from liability</b></p> <p>Where an instrument confers immunity from liability, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the immunity;</li> <li>• why the breadth of the immunity is considered necessary and appropriate; and</li> <li>• why the immunity is necessary for each specific class of person to whom it applies.</li> </ul>
<input type="checkbox"/>	<p><b>Procedural fairness</b></p> <p>Where an instrument excludes or limits the right to procedural fairness, for example, by infringing upon the fair hearing rule or no bias rule, the explanatory statement should comprehensively explain why it is necessary to exclude or limit procedural fairness.</p>
<input type="checkbox"/>	<p><b>Reverse burden of proof</b></p> <p>Where an instrument reverses the evidential or legal burden of proof by requiring the defendant to raise evidence about a matter (evidential burden) or to positively prove a matter (legal burden), the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the provisions; and</li> <li>• why it is considered necessary and appropriate to reverse the burden of proof, noting that a much stronger justification is necessary to justify reversing the legal burden;</li> <li>• whether the provisions satisfy the following test from the Attorney-General's Department's <a href="#">Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</a> at [4.3]: <ul style="list-style-type: none"> <li>○ whether the relevant matter is peculiarly within the knowledge of the defendant; and</li> <li>○ whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish; and</li> </ul> </li> <li>• if the provision reverses the legal burden of proof (requires the defendant to positively prove a matter), why this is considered necessary.</li> </ul>
<input type="checkbox"/>	<p><b>Strict and absolute liability</b></p> <p>Where an instrument contains offences of strict or absolute liability, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of each offence, including what penalty attaches to each offence; and</li> <li>• why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's <a href="#">Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</a> at [2.2.6].</li> </ul>
<input type="checkbox"/>	<p><b>Availability of independent merits review</b></p> <p>Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• whether independent merits review is available; and</li> <li>• if merits review has not been made available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, <a href="#">What decisions should be subject to merit review?</a></li> </ul>

	<ul style="list-style-type: none"> <li>if merits review of a decision under the instrument is expressly precluded by the enabling legislation, a description of additional safeguards in relation to the relevant decisions, such as special training for decision-makers, guidance for decision-makers in exercising their discretion, and the availability of other forms of external review such as by the Ombudsman.</li> </ul>
<input type="checkbox"/>	<p><b>Availability of judicial review</b></p> <p>Where an instrument excludes or limits the availability of judicial review for a decision, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>the nature and scope of the exclusion or limitation, such as a no-invalidity clause;</li> <li>why the exclusion or limitation is necessary and appropriate, noting the serious consequences it will have for a person affected by the decision; and</li> <li>the nature and scope of any relevant safeguards in the absence of judicial review.</li> </ul>
<input type="checkbox"/>	<p><b>Significant elements of a regulatory scheme</b></p> <p>If an instrument contains significant elements of such a program or scheme, the explanatory statement should explain why it is considered necessary and appropriate to include significant elements of the scheme in delegated rather than primary legislation.</p>
<input type="checkbox"/>	<p><b>Significant penalties</b></p> <ul style="list-style-type: none"> <li>Where an instrument imposes a penalty for individuals above 50 penalty units or 250 penalty units for corporations, or imposes a custodial penalty, the explanatory statement should explain: <ul style="list-style-type: none"> <li>the source of the specific legislative authority to impose the penalties;</li> <li>why the penalties are appropriate to the relevant offence;</li> <li>why it is considered necessary and appropriate to include such penalties in delegated legislation;</li> <li>where an instrument includes custodial penalties, whether the Attorney-General was consulted, in accordance with Part 3.3 of the Attorney-General's Department's <a href="#">Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</a>.</li> </ul> </li> </ul>
<input type="checkbox"/>	<p><b>Imposition of taxes and levies</b></p> <p>Where an instrument imposes a charge, fee or levy, the explanatory statement should explain the purpose of the imposition (e.g., fee for services rendered). Where the amount does constitute a tax or levy, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g., a charges Act);</li> <li>whether the enabling Act imposes any limitations on the imposition of taxation (e.g., a statutory cap on the amount that may be imposed); and</li> <li>why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.</li> </ul>
<input type="checkbox"/>	<p><b>Exemption and deferral from sunseting</b></p> <p>Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement should:</p> <ul style="list-style-type: none"> <li>identify the specific legislative authority for the exemption; and</li> <li>explain the exceptional circumstances that justify the exemption.</li> </ul> <p>Where an instrument defers the sunseting date of another instrument, the explanatory statement should:</p> <ul style="list-style-type: none"> <li>explain how the deferral of sunseting meets the requirements of section 51 of the Legislation Act; and</li> <li>explain why the deferral is necessary and appropriate.</li> </ul>
<input type="checkbox"/>	<p><b>Amendment, modification or</b></p> <p>Where an instrument includes a provision which amends or modifies primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain:</p>

<p><b>exemptions from, primary legislation</b></p>	<ul style="list-style-type: none"> <li>• the specific legislative authority relied upon to create the amendment, modification, or exemption to primary legislation in delegated legislation;</li> <li>• the nature and scope of the amendment, modification, or exemption, including the persons, entities or classes of persons or entities to which it applies;</li> <li>• why it is considered necessary and appropriate to create the amendment, modification or exemption to primary legislation in delegated legislation (rather than directly amending the relevant primary legislation);</li> <li>• the duration of the amendment, modification or exemption and, if the instrument is not time limited, the reason for why this is necessary; and</li> <li>• whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including to determine whether it is appropriate to include the provisions in delegated legislation).</li> </ul>
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## Principle (h): Personal rights and liberties

### Overview

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. Under this principle, the committee will typically be concerned with instruments which:

- provide for the collection, use and/or disclosure of personal information;
- contain coercive powers;
- apply retrospectively or have retrospective effect;
- abrogate the privilege against self-incrimination;
- confer immunity from liability;
- exclude or limit procedural fairness;
- reverse the legal or evidential burden of proof; or
- contain offences of strict or absolute liability.

### Collection, use and disclosure of personal information

Provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the explanatory statement should explain:

- the nature and scope of the provisions, including the extent of the personal information that may be disclosed and the persons or entities to whom disclosure is permitted;
- why the provisions are considered necessary and appropriate;
- whether a privacy impact statement was prepared; and
- what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

### Coercive powers

Provisions which contain coercive powers have the potential to seriously trespass on personal rights and liberties and should generally not be included in delegated legislation. These include provisions which authorise persons to enter, search, seize or destroy property or to use force against others. Where an instrument nevertheless contains such provisions, the explanatory statement to the instrument should explain:

- the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the powers, and the circumstances in which the powers will be exercised;
- why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
- who may exercise the powers, and whether they are required to possess specific skills or qualifications;
- whether the use of powers is subject to appropriate oversight;
- whether compensation is available for any property seized or destroyed in the exercise of the powers;

- whether independent review is available of decisions made, and actions taken, in connection with the exercise of the powers; and
- whether the provisions comply with Chapters 7 and 8 of the Attorney-General's Department's [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#).

### **Retrospective commencement or effect**

The common law has long recognised the right to protection against retrospective laws. Such laws undermine legal certainty. Retrospectivity will arise where an instrument commences retrospectively or has a retrospective effect. For example, an instrument may have a retrospective effect where it attaches new conditions or requirements to processes which had commenced under a previous legal framework, via the application of transitional provisions.

Where an instrument commences retrospectively, or has a retrospective effect, the explanatory statement to the instrument should explain:

- the nature and scope of the provisions;
- why the retrospectivity is considered necessary and appropriate; and
- whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been taken or will be taken to avoid such disadvantage.

The committee may also raise retrospective commencement under scrutiny principle (a), compliance with legislative requirements, in ascertaining whether the instrument complies with section 12 of the *Legislation Act 2003*.

### **Abrogation of the privilege against self-incrimination**

The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may incriminate them. Where an instrument abrogates the privilege against self-incrimination, the committee will generally expect the instrument to provide appropriate safeguards including use and derivative use immunity to prevent information from being used in criminal proceedings against the person. The committee will also expect the instrument to impose restrictions on the sharing of information obtained with law enforcement agencies. Further information on these safeguards is available in Chapter 9 of the Attorney-General's Department's [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#).

Where an instrument abrogates the privilege against self-incrimination, the explanatory statement to the instrument should explain:

- the nature and scope of the abrogation of the privilege against self-incrimination, including any limitations on the abrogation;
- why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
- the provision of use or derivative use immunity; and
- any restrictions on the sharing of information obtained with law enforcement agencies.

### **Immunity from liability**

Provisions which confer immunity from liability or extend existing immunities, for example, by providing that criminal or civil proceedings cannot be brought against specified persons or bodies, limit the common law right to bring an action to enforce legal rights. Where an instrument includes such provisions, the explanatory statement to the instrument should explain:



- the nature and scope of the immunity;
- why the breadth of the immunity is considered necessary and appropriate; and
- why the immunity is necessary for each specific class of person to whom it applies.

### **Procedural fairness**

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person whose rights or interests may be adversely affected by a decision to be given an adequate opportunity to present their case and have it considered before a final decision is made. Under the no bias rule, decision-makers must not be biased in fact and must not appear to be biased. Where an instrument limits or denies the right to procedural fairness, such as by restricting or excluding disclosure of adverse information to the person affected by the decision, the explanatory statement should provide a comprehensive justification for the exclusion or limitation.

### **Reverse burden of proof**

The right to be presumed innocent is a fundamental principle of the Australian legal system. Normally, the right requires the prosecution to prove all elements of an offence. Consequently, this right is undermined by provisions which require the defendant to raise evidence about the matter (reverse evidential burden), or positively prove a matter (reverse legal burden). In practice, this issue typically arises in the context of 'offence-specific defence' provisions, which establish a defence to the prosecution where the defendant raises evidence about a particular matter. If an instrument contains such provisions, the explanatory statement should explain:

- the nature and scope of the provisions;
- why it is considered necessary and appropriate to reverse the burden of proof, noting that a much stronger justification is necessary to justify reversing the legal burden;
- whether the provisions satisfy the following test from the Attorney-General's Department's [\*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#) at [4.3]:
  - whether the relevant matter is peculiarly within the knowledge of the defendant; and
  - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter; and
- if the provision reverses the legal burden of proof (requires the defendant to positively prove a matter), why this is considered necessary.

### **Strict and absolute liability**

The requirement for the prosecution to prove fault on the part of a defendant is an important aspect of the common law right to be presumed innocent. The application of strict and absolute liability undermines this right by removing the requirement to prove fault in relation to one or more physical elements of an offence. Where an instrument includes offences of strict or absolute liability, the explanatory statement should explain:

- the nature and scope of each offence, including what penalty attaches to each offence; and
- why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [\*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#) at [2.2.6].

The explanatory statement should include a particularly robust justification for imposing absolute liability, as this not only removes the fault element but also excludes the defence of honest and reasonable mistake of fact.

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (h).

- Collection, use and disclosure of personal information** Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:
  - the nature and scope of the provisions, including the extent of the personal information that may be disclosed and the persons or entities to whom disclosure is permitted;
  - why the provisions are considered necessary and appropriate;
  - whether a privacy impact statement was prepared; and
  - what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).
  
- Coercive powers** Where an instrument includes entry, search and seizure powers, provides for the confiscation or destruction of personal property, or authorises the use of force, the explanatory statement should explain:
  - the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the powers, and the circumstances in which the powers will be exercised;
  - why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
  - who may exercise the powers, and whether they are required to possess specific skills or qualifications;
  - whether compensation is available for any property seized or destroyed in the exercise of the powers;
  - whether independent review is available of decisions made, and actions taken, in connection with the exercise of the powers; and
  - whether the provisions comply with Chapters 7 and 8 of the Attorney General's Department's [\*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#).
  
- Retrospective commencement or effect** Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:
  - the nature and scope of the provisions;
  - why the retrospectivity is considered necessary and appropriate; and
  - whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.
  
- Abrogation of privilege against self-incrimination** Where an instrument abrogates this privilege, the explanatory statement should explain:
  - the nature and scope of the abrogation of the privilege against self-incrimination, including any limitations on the abrogation;
  - why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;

- the provision of use or derivative use immunity; and
- any restrictions on the sharing of information obtained with law enforcement agencies.

- Immunity from liability** Where an instrument confers immunity from liability, the explanatory statement should explain:
- the nature and scope of the immunity;
  - why the breadth of the immunity is considered necessary and appropriate; and
  - why the immunity is necessary for each specific class of person to whom it applies.
- Procedural fairness** Where an instrument excludes or limits the right to procedural fairness, for example, by infringing upon the fair hearing rule or no bias rule, the explanatory statement should comprehensively explain why it is necessary to exclude or limit procedural fairness.
- Reverse burden of proof** Where an instrument reverses the evidential or legal burden of proof by requiring the defendant to raise evidence about a matter (evidential burden) or to positively prove a matter (legal burden), the explanatory statement should explain:
- the nature and scope of the provisions; and
  - why it is considered necessary and appropriate to reverse the burden of proof, noting that a much stronger justification is necessary to justify reversing the legal burden;
  - whether the provisions satisfy the following test from the Attorney-General's Department's [\*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#) at [4.3]:
    - whether the relevant matter is peculiarly within the knowledge of the defendant; and
    - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish; and
  - if the provision reverses the legal burden of proof (requires the defendant to positively prove a matter), why this is considered necessary.
- Strict and absolute liability** Where an instrument contains offences of strict or absolute liability, the explanatory statement should explain:
- the nature and scope of each offence, including what penalty attaches to each offence; and
  - why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [\*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers\*](#) at [2.2.6].



# Principle (i): Availability of independent review

## Overview

Senate standing order 23(3)(i) requires the committee to scrutinise each instrument as to whether it unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, liberties, obligations or interests. Under this principle, the committee will typically be concerned with instruments which:

- exclude, limit or fail to provide for independent merits review; or
- exclude or limit judicial review, such as by containing a no-invalidity clause.

## Availability of independent merits review

Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect a person's rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review.

Accordingly, the explanatory statement to any instrument including such powers should provide:

- whether independent merits review is available;
- if merits review has not been made available, the characteristics of the relevant decisions which justify their exclusion by reference to the Administrative Review Council's guide [What decisions should be subject to merit review?](#); and
- if merits review of a decision under the instrument is expressly precluded by the enabling legislation, a description of additional safeguards in relation to the relevant decisions, such as special training for decision-makers, guidance for decision-makers in exercising their discretion, and the availability of other forms of external review such as by the Ombudsman.

The committee considers that the following factors alone will not constitute a sufficient justification for excluding independent merits review where there are no other relevant justifications or safeguards:

- the enabling legislation does not provide for merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act);
- the relevant decisions are not made 'under an enactment';
- the availability of judicial review or natural justice in relation to the decision; and
- the availability of internal review (for example, review by a departmental officer) or review by the Ombudsman.

The committee's concerns under this principle will be heightened where independent merits review is not available in relation to provisions that provide for automated decision-making, as this may fetter the exercise of discretionary power. This issue is discussed further in the guideline on principle (c).

## Availability of judicial review

The exclusion or limitation of judicial review of administrative action removes a fundamental right for a person affected by the decision to challenge it in court. Such limitations are sometimes created by no invalidity clauses, which provide that an act or decision will not be legally invalid even if it breaches certain statutory requirements. Such clauses potentially restrict an applicant's capacity to seek meaningful judicial review of the relevant act or decision. Accordingly, where an instrument excludes

or limits the availability of judicial review for a decision, the explanatory statement to the instrument should explain:

- the nature and scope of the exclusion or limitation, such as a no-invalidity clause; and
- why the exclusion or limitation is necessary and appropriate, noting the serious consequences it will have for a person affected by the decision; and
- the nature and scope of any relevant safeguards in the absence of judicial review.

## Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- Availability of independent merits review** Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the explanatory statement should explain:
  - whether independent merits review is available;
  - if merits review has not been made available, the characteristics of the relevant decisions which justify their exclusion, by reference to the Administrative Review Council's guide [\*What decisions should be subject to merit review?\*](#); and
  - if merits review of a decision under the instrument is expressly precluded by the enabling legislation, a description of additional safeguards in relation to the relevant decisions, such as special training for decision-makers, guidance for decision-makers in exercising their discretion, and the availability of other forms of external review such as by the Ombudsman.
- Availability of judicial review** Where an instrument excludes or limits the availability of judicial review for a decision, the explanatory statement should explain:
  - the nature and scope of the exclusion or limitation, such as a no-invalidity clause;
  - why the exclusion or limitation is necessary and appropriate, noting the serious consequences it will have for a person affected by the decision; and
  - the nature and scope of any relevant safeguards in the absence of judicial review.

## **Principle (j): Matters more appropriate for parliamentary enactment**

### **Overview**

Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment. This principle is underpinned by the committee's view that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation. Under this principle, the committee will typically be most concerned with instruments that:

- establish significant elements of a program of national significance or of a regulatory scheme;
- impose significant penalties; and
- impose taxes or levies.

### **Elements of a significant program or regulatory scheme**

Significant elements of a program of national significance or a regulatory scheme should ordinarily be included in primary rather than delegated legislation, due to the higher level of parliamentary scrutiny associated with the legislative process for primary legislation.

Significant elements of such schemes include matters such as:

- authorising significant expenditure for programs or schemes of national significance, including regulatory schemes;
- key definitions central to the operation of a program or scheme of national significance or of a regulatory scheme;
- significant elements of how the relevant program or scheme is to operate (for example, whether a scheme is to be 'opt in' or 'opt out').

If an instrument nevertheless contains significant elements of such a program or scheme, the explanatory statement should explain why it is considered necessary and appropriate to include significant elements of the scheme in delegated rather than primary legislation.

The committee does not generally consider operational flexibility or an urgent need to establish legislative authority, on their own, to constitute a sufficient justification for including significant elements of such a scheme in delegated legislation.

### **Significant penalties**

The committee's view is that serious criminal offences and significant penalties should ordinarily be included in primary rather than delegated legislation. This is to ensure appropriate parliamentary oversight of the scope of such offences and penalties.

The committee's view is that delegated legislation should not contain custodial penalties, or penalties exceeding 50 penalty units for individuals and 250 penalty units for corporations. If an instrument does include such penalties, the explanatory statement should explain:

- the source of the specific legislative authority to impose the penalties;
- why the penalties are appropriate to the relevant offence;
- why it is necessary and appropriate to include the penalties in delegated legislation; and

- where an instrument includes custodial penalties, whether the Attorney-General was consulted, in accordance with Part 3.3 of the Attorney-General's Department's [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#).

## Imposition of taxes or levies

The levying of taxation is one of the most fundamental functions of the Parliament. Accordingly, the committee considers that taxes should generally be imposed by primary legislation. If an instrument imposes a tax or levy, the instrument should solely deal with that matter, and the explanatory statement should explain:

- the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g., a charges Act);
- whether the enabling Act sets any limits on the imposition of tax (e.g., a statutory cap on the amount that may be imposed); and
- why it is considered necessary and appropriate to use delegated legislation to set the levy or tax.

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (j).

- |                          |  |  |
|--------------------------|--|--|
| <input type="checkbox"/> | <b>Significant elements of a regulatory scheme</b> | If an instrument contains significant elements of such a program or scheme, the explanatory statement should explain why it is considered necessary and appropriate to include significant elements of the scheme in delegated rather than primary legislation.  |
| <input type="checkbox"/> | <b>Significant penalties</b>                       | <p>Where an instrument imposes a penalty for individuals above 50 penalty units or 250 penalty units for corporations, or imposes a custodial penalty, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the source of the specific legislative authority to impose the penalties; why the penalties are appropriate to the relevant offence;</li> <li>• why it is considered necessary and appropriate to include such penalties in delegated legislation;</li> <li>• where an instrument includes custodial penalties, whether the Attorney-General was consulted, in accordance with Part 3.3 of the Attorney-General's Department's <a href="#">Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</a>.</li> </ul> |
| <input type="checkbox"/> | <b>Imposition of taxes and levies</b>              | <p>Where an instrument imposes a tax or levy, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the legislative authority relied upon for using delegated legislation to set the levy or tax (e.g., a charges Act);</li> <li>• whether the enabling Act imposes any limitations on the imposition of taxation (e.g., a statutory cap on the amount that may be imposed); and</li> <li>• why it is considered necessary and appropriate to use delegated legislation to set the levy or tax, rather than primary legislation.</li> </ul>   |



## Principle (k): Exemption and deferral from sunseting

### Overview

Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether it is exempt from the sunseting provisions of the *Legislation Act 2003* (the 'Legislation Act'). In addition, the committee will scrutinise instruments which defer the sunseting date of another instrument. Under this principle, the committee will typically be concerned with instruments which:

- are exempt from the sunseting provisions of the Legislation Act;
- contain measures that will remain in force within a principal instrument that is exempt from sunseting; and
- defer the sunseting date of another instrument.

### Exemption from sunseting

Section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. This process is called 'sunseting'. The committee considers that the current sunseting framework provides an important opportunity for the Parliament to maintain effective and regular oversight of its delegated legislative powers and ensures that the content of legislative instruments remains current and fit for purpose. In this way, the regime promotes parliamentary supremacy.

The committee considers that delegated legislation should be subject to sunseting unless there are exceptional circumstances. The committee will scrutinise each instrument as to whether the exemption is appropriate.

The committee is particularly concerned about the following:

- instruments that are exempt under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;
- instruments that are exempt under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the Legislation Act;
- an exempt instrument that overrides or modifies primary legislation;
- an exempt instrument that triggers, or is a pre-condition to, the imposition of custodial penalties or significant pecuniary penalties;
- an exempt instrument that restricts or limits individual rights and liberties;
- an exempt instrument that facilitates the expenditure of public money on an ongoing basis; and
- an exempt instrument that otherwise contains a matter requiring parliamentary oversight.

To assess whether an instrument is appropriately exempt from sunseting, the committee expects the explanatory statement to identify the specific legislative authority for the exemption and explain the exceptional circumstances that justify the exemption.

### Deferral of sunseting date

Section 51 of the Legislation Act provides that the Attorney-General may defer the sunseting of an instrument in certain circumstances.

Where an instrument defers the sunseting date of another instrument, the explanatory statement to the instrument should set out how the deferral of sunseting meets the requirements of section 51 of the Legislation Act and should explain why the deferral is necessary and appropriate.

## **Explanatory statement checklist**

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (k).

- Exemption from sunseting**      Where an instrument is exempt from sunseting, or contains measures that will remain in force within a principal instrument that is exempt from sunseting, the explanatory statement should:
  - identify the specific legislative authority for the exemption; and
  - explain the exceptional circumstances that justify the exemption.
  
- Deferral of sunseting date**      Where an instrument defers the sunseting date of another instrument, the explanatory statement should:
  - explain how the deferral of sunseting meets the requirements of section 51 of the Legislation Act; and
  - explain why the deferral is necessary and appropriate.

# Principle (I): Modification of primary legislation

## Overview

Senate standing order 23(3)(I) requires the committee to scrutinise each instrument as to whether it amends, modifies, or creates exemptions to, the operation of primary legislation, and whether such an instrument is in force only for as long as is strictly necessary.

## Amendment, modification or exemptions from primary legislation

Provisions in delegated legislation which amend, modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. These concerns are further heightened where the relevant provisions operate on an ongoing basis.

The committee has a longstanding expectation that such provisions should be contained in primary legislation. Where such provisions are nonetheless contained in delegated legislation, the committee expects that they should be time-limited and operate no longer than *strictly necessary*. The committee considers that in most cases, this means the instrument should cease to operate no longer than three years after it commences. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, the committee expects the explanatory statements to such instruments to explain:

- the specific legislative authority relied upon to create the amendment, modification, or exemption to primary legislation in delegated legislation; and
- the nature and scope of the amendment, modification, or exemption, including the persons, entities or classes of persons or entities to which it applies; and
- why it is considered necessary and appropriate to create the amendment, modification or exemption to primary legislation in delegated legislation (rather than directly amending the relevant primary legislation); and
- the duration of the amendment, modification or exemption and, if the instrument is not time limited, the reason for why this is necessary; and
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including to determine whether it is appropriate to continue to include the provisions in delegated legislation or to include them in primary legislation such as the enabling Act).

## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under scrutiny principle (I).

- Amendment, modification or exemption from primary legislation** Where an instrument includes a provision which amends or modifies primary legislation, or exempts persons or entities from the operation of primary legislation, the explanatory statement should explain:
  - the specific legislative authority relied upon to create the amendment, modification, or exemption to primary legislation in delegated legislation;
  - the nature and scope of the amendment, modification, or exemption, including the persons, entities or classes of persons or entities to which it applies;
  - why it is considered necessary and appropriate to create the amendment, modification or exemption to primary legislation in delegated legislation (rather than directly amending the relevant primary legislation);
  - the duration of the amendment, modification or exemption and, if the instrument is not time limited, the reason for why this is necessary; and
  - whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate (including to determine whether it is appropriate to include the provisions in delegated or primary legislation).

## **Principle (m): Other technical scrutiny grounds**

### **Overview**

Senate standing order 23(3)(m) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. The matters raised by the committee under this principle will vary from instrument to instrument. However, they will be underpinned by the committee's concern to ensure adequate parliamentary oversight and protect and promote fundamental rule of law principles. The following sections provide additional guidance on some key issues which the committee may raise under scrutiny principle (m).

### **Use of notifiable instruments**

The committee will scrutinise a power to create a notifiable instrument that is contained in a legislative instrument. Notifiable instruments are not subject to the same level of parliamentary oversight as legislative instruments. In particular, notifiable instruments are not required to be tabled in both Houses of Parliament. They are also not subject to disallowance or sunseting.

Therefore, the committee will be concerned where a notifiable instrument determines a matter that is legislative in character, such as affecting a privilege, right, interest or obligation. For example, where a legislative instrument enables a notifiable instrument to specify disclosable personal information. Accordingly, the committee expects that notifiable instruments will only be used in relation to matters that are not of a legislative character.

Accordingly, where a legislative instrument provides for the inclusion of matters in a notifiable instrument, the instrument's explanatory statement should explain how such matters are not of a legislative character. It should also explain why the use of a notifiable instrument is considered necessary and appropriate.

### **Disclosure of funding amounts**

The committee will scrutinise instruments made under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* to support the parliamentary oversight of Commonwealth expenditure. As these instruments authorise the expenditure of public money on specified grants and programs, the committee expects their explanatory statements to describe the nature and scope of relevant programs or grants authorised by the instrument, including the amount of expenditure and the entities to which the funding will be provided.

### **Tabling of significant reports and other documents**

Tabling significant documents in Parliament is important for effective parliamentary scrutiny because it alerts parliamentarians to the existence of these documents and provides opportunities for debate. The committee expects instruments providing for the creation of significant reports and documents to also require those documents to be published and tabled in Parliament. Where an instrument does not include this requirement, the explanatory statement should explain why excluding the publication and tabling of significant reports and other documents is necessary and appropriate.



# Standing order 23(4A): Instruments exempt from disallowance

## Overview

Standing order 23(4A) provides that the committee may scrutinise instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance.

## Exemption from disallowance

The committee expects explanatory statements to instruments that are exempt from disallowance to identify the legislative source which provides for the exemption. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the *Legislation Act 2003* ('Legislation Act') or under the Legislation (Exemptions and Other Matters) Regulation 2015 to be sufficient.

The committee is particularly concerned about the following:

- instruments that are exempt under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
- instruments that are exempt under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the Legislation Act;
- an exempt instrument that overrides or modifies primary legislation;
- an exempt instrument that triggers, or is a pre-condition to, the imposition of custodial penalties or significant pecuniary penalties;
- an exempt instrument that restricts or limits individual rights and liberties;
- an exempt instrument that facilitates the expenditure of public money, including Advance to the Finance Minister determinations; and
- an exempt instrument that otherwise contains a matter requiring parliamentary oversight.

## Justifying the exemption from disallowance

To support parliamentary oversight of delegated legislation made by the executive, the committee considers that delegated legislation should be subject to disallowance unless there are exceptional circumstances. Any claim that circumstances justify an exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.

The committee expects that explanatory statements to exempt instruments should set out in detail the exceptional circumstances that are claimed to justify the exemption from disallowance.

### ***Common justifications likely to be insufficient***

The committee has not generally accepted the following rationales as adequate to justify exempting instruments from disallowance.

#### *The instrument is made for the purpose of an intergovernmental scheme*

The committee does not generally consider the fact that an instrument is made for the purpose of an intergovernmental scheme to be a sufficient justification to exempt an instrument from disallowance. While, in some instances, such an instrument may be a product of significant negotiation in the process of obtaining agreement from all government parties, this is not necessarily the case. Moreover, the committee does not consider the fact that a number of executive governments have reached an agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such an agreement.

#### *The need to take urgent and decisive action*

The committee does not generally consider the need for urgent and decisive action to be a sufficient justification to exempt an instrument from disallowance. This is because the Parliament must have effective oversight of these critical decisions and retain the ability to scrutinise the actions of the executive. Further, the disallowable status of delegated legislation does not prevent the executive from acting quickly and decisively as it does not impede the immediate commencement and enforceability of an instrument. Moreover, if an instrument is subsequently disallowed, which may only occur after it has been tabled in the Parliament, the disallowance will not invalidate actions taken under the instrument prior to disallowance.

#### *The potential for the disallowance process to create uncertainty*

The committee does not generally consider the potential for disallowance to create uncertainty for stakeholders to be a sufficient justification for the exemption. The committee considers a need for certainty is outweighed by the Parliament's fundamental constitutional role as the principal lawmaking authority. Moreover, senators and members, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations and their accountability to their electors.

The committee considers that the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments made during times of emergency, the committee considers that the disallowance process would facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

While the committee does not consider that arguments against providing for disallowance on the basis that it may undermine certainty are persuasive, the committee considers that in many contexts any uncertainty can be overcome by having delegated legislation commence after the disallowance period has passed, or by providing that an instrument does not come into effect until it has been approved by resolution of each House of the Parliament.



## Explanatory statement checklist

The following checklist summarises what should be included in an instrument's explanatory statement under Senate standing order 23(4A).

- Identification of source of exemption from disallowance** Where an instrument is exempt from disallowance, the explanatory statement should identify the specific legislative source of the exemption.
  
- Justification for exemption from disallowance** Where an instrument is exempt from disallowance, the explanatory statement should set out in detail the exceptional circumstances that are claimed to justify the exemption from disallowance.